

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 621(a)(1) of the Cable)	MB Docket No. 05-311
Communications Policy Act of 1984 as Amended)	
by the Cable Television Consumer Protection and)	
Competition Act of 1992)	

**COMMENTS ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING
OF THE TELECOMMUNICATIONS BOARD OF NORTHERN KENTUCKY**

The Telecommunications Board of Northern Kentucky appreciates the opportunity to file comments on the Second Further Notice and Proposed Rulemaking (“FNPRM”) in the above-referenced docket.

The Telecommunications Board of Northern Kentucky (TBNK) is the cable television regulatory authority created by an interlocal cooperative agreement among 16 Local Governmental entities (1 county and 15 cities) in **Kenton County, Kentucky**. The TBNK handles franchise negotiation, administration and regulation of cable television franchise issues for and on behalf of the Local Governments, as well as the supervision and operation of Public, Educational and Governmental (PEG) access television programming and channels as a service to local viewers, as well as related services, including PEG facilities and training provided to our local residents, community organizations, and non-profits, who wish to learn about television and produce their own shows.

TBNK member communities include Kenton County, Kentucky and the cities of Bromley, Covington, Crestview Hills, Edgewood, Elsmere, Ft. Mitchell, Ft. Wright,

Independence, Kenton Vale, Lakeside Park, Ludlow, Park Hills, Ryland Heights, Taylor Mill, Villa Hills.

Here at, the Telecommunications Board of Northern Kentucky (TBNK,) local residents, non-profits and community based organizations have been producing public service television for Northern Kentucky in our PEG television studio since 1998 – making television (still our most influential medium) available to everyone in our member communities, and providing the first amendment platform that congress intended. Our local PEG channels televise a wealth of programming focused on our Northern Kentucky communities, which have largely been ignored by Cincinnati Broadcasters for decades. Now in our second decade, these local residents, community stake holders and the TBNK have produced a wide array of programming that has been an asset to the entire Northern Kentucky community.

Our franchise area has two (2) competing MVPD providers: Spectrum/Charter Communications (which bought the system from Time Warner Cable) and Cincinnati Bell Extended Territories, which entered the market as a new competing provider in 2009. Franchise Fees and PEG obligations have not prevented both operators from competing strongly in this market.

Spectrum/Charter Communications provides 7 channels for PEG programming in our communities: 1 Full-time Government Access Channel, which airs over 20 meetings per month – most live and with multiple replays in order to inform the public of the deliberations and actions of the local governments; 1 Full-time Educational Access Channel, which is provided for the use and benefit of five different high schools and various grade schools in our franchise area in order to provide programming for students, their families and the general public; a second Full-time Educational Access Channel dedicated to Northern Kentucky University, which the

university programs in order to provide programming related to the university for students, their families and the general public; 3 Public Access Channels, one of which is used heavily by numerous local churches to air services for their congregations and the public at large, the other two, which provide free air time for local residents, non-profits and community organizations, air a wide variety of local community programming focused on areas of interest to Northern Kentucky for Northern Kentucky viewers; and another channel that is split between educational access and additional governmental access programming in the evening (for nights with multiple live meeting coverage and other government informational programming.) Cincinnati Bell Extended Territories also provides 7 identical channels for PEG programming as a benefit to our communities and the approximately 27,000 plus subscribers in our franchise area.

We disagree with and object to many aspects of this Second Further Notice and Proposed Rulemaking (“FNPRM”), and especially to the proposed ruling to allow all “cable-related, in-kind contributions,” other than PEG capital costs and build out requirements, to be treated as “franchise fees,” and, as such, to allow most PEG related obligations, including the provision of the PEG channels themselves and the connections to those channels to be deducted from franchise fees owed to Local Franchise Authorities (LFA’s.) These actions would have a crippling effect for most PEG channels, programs and services across the county, if not kill most of them all together, which runs counter to congress’ clear and stated goals related to PEG channels in the Telecommunications Act of 1996 (and the various preceding iterations of cable franchising law.)

Since the inception of cable, franchising law included franchise fees, and from very early on, it also included the provision of PEG channels and facilities and related I-NETs, with the promise of local channels and programming and a First Amendment community soap box for the

communities, whose local property the cable operators use for their for profit business. There was never any concept of an either/or choice between franchise fees and PEG channels (and the interconnection for such channels and ability to monitor the channels) and related I-NETs. If this had been the interpretation for the last forty plus years, it would not have taken until now for the cable providers and their lobbyists and the FCC to come up with this attempt to kill PEG obligations, by forcing cities and counties to choose between franchise fees or PEG channels and services.

Cities cannot afford to lose what are likely to be significant portions of – or their entire amount of – franchise fees, which means this proposed ruling would kill PEG channels.

It makes no sense to imagine that congress would have intended that PEG channels, related PEG obligations, I-NETs and the interconnection of the PEG channels would be deducted from franchise fees, while at the same time congress would protect PEG capital fees and specifically state that those fees are not franchise fees, since the deduction of the “value” of PEG channels and related PEG obligations would result in the crippling or elimination of the PEG channels, I-NETs and related PEG requirements, which would then mean the PEG Capital Fees that are protected from franchise fees would exist to fund PEG channels that likely would no longer exist. This nonsensical interpretation renders the PEG Capital Fees illogical.

Why would congress bother to define both PEG channel capacity and franchise fees as franchise obligations that LFA's are authorized to require, if they are not separate items, and then why would congress protect PEG capital fees in support of the use of that same PEG channel capacity, if those very same PEG channels could then be crippled or eliminated by deducting them from franchise fees. Since PEG fees were defined as for capital only, where was the

operational funding supposed to come from if franchise fees were taken away through all of these deductions?

In addition, SECTION. 622. [47 U.S.C. 542] FRANCHISE FEES under subsection (c) States that “Each cable operator may identify, consistent with the regulations prescribed by the commission pursuant to section 623, as a separate line item on each regular bill of each subscriber, each of the following:”

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

These three sections define what types of costs can be line itemized on the subscriber bill. Each of these costs are different things, and are listed as such in separate subsections. Subsection (1) clearly states that the amount of the total bill assessed as a franchise fee may be line itemized. That total amount would necessarily include all things that are included or defined as a franchise fee or costs that can be off-set against the franchise fee. Subsection (2) separately states that the amount of the total bill assessed to satisfy any requirements to support PEG channels AND THE USE OF THOSE PEG CHANNELS may be line itemized. If the costs of PEG channels and the use of PEG channels were considered by congress to be a franchise fee, then they would not have needed to list them separately in sub-section (2). They would have been included or understood to be included in the same subsection (1) with franchise fees. These

two separate costs are clearly defined as separate costs to be taken as separate amounts of the total bill – NOT offset from each other.

Furthermore, The FCC was given authority to establish the rates that a cable provider may charge for Leased Access, but no such directions to establish what a cable provider may charge for a PEG channel, because – unlike the instance of Leased Access – congress intended there to be NO charges by the cable operator for PEG Access. If congress intended for PEG Access obligations to be charged against or offset franchise fees, then congress would have anticipated the need for and given the FCC the authority to determine such rates, as congress did in the instance of Leased Access under SEC. 612. [47 U.S.C. 532] CABLE CHANNELS FOR COMMERCIAL USE.

Next, the FNPRM also proposes that deductions from franchise fees for cable related benefits would be calculated based on the fair market value of the PEG franchise requirements – not by a cost based method. The Commission invites comments on whether it should instead be calculated based on the cost to the cable operator.

Frist, we reiterate our disagreement with the idea of any deductions from franchise fees for cable related franchise requirements, but we also disagree with this market value approach. No one has any idea how much the franchise fee deductions (or charges) would even be. This fair market value methodology will result in a greater reduction of franchise fees than a cost-based methodology and leaves the cable companies open to making up any arbitrary exaggerated amounts that they wish with no recourse for the LFA's. Why is the FCC so quick to tell LFA's what their calculations and limitations shall be for any fees that the LFA's might charge, but make no attempt at all to apply the same over-sight to cable providers?

The “FNPRM” tentatively concludes that build-out requirements would not be considered franchise fees because these requirements are not specifically for the use or benefit of the local government or an entity designated by the local government. Under this reasoning the FCC’s tentative conclusion to consider PEG related obligations to be a franchise fee is inconsistent, since PEG related obligations are specifically designed to benefit the public, as are most “cable-related, in-kind contributions.”

For example, today the TBNK offers truly Public Service Television to our community through a grass roots television studio. By partnering with many volunteers and community organizations we provide truly local television programming. This is TV For Our Community; By Our Community. These PEG channels and related facilities are provided to our communities, residents, local organizations and – very importantly - the local viewers as a public service and benefit to the entire community.

We also provide hands-on training and equipment and studio use as well as free air-time for those who wish to make their own programs. Northern Kentucky residents, non-profits and community organizations use the TBNK studio facilities and the PEG channels to get their message out to the public and to produce their own programming, which provides a window through which viewers can experience the diversity of culture and entertainment, recreational activities, community events, faith based programming and artistic endeavors in their local community...creating television for the people and by the people.

These PEG channels are especially important to our Northern Kentucky communities, which are suburbs of Cincinnati, Ohio, but are located across the state border in Northern Kentucky. As such, the Cincinnati media pays little attention to our Northern Kentucky communities, and provides little coverage. Since the first franchise in 1980, our community

leaders have consistently made it a priority to provide Northern Kentucky coverage and programs on the cable system as a service to our communities.

To expand on the summary of the PEG programming and services outlined above, the TBNK helps educate voters, by providing the only significant television coverage of election campaigns in Northern Kentucky, including the only LIVE Northern Kentucky focused election night results show, and numerous election forums and debates every election season leading up to election night for city, county, state, and national races.

The TBNK Main Event Channel provides a vast amount of Northern Kentucky sports and community event coverage, including over 25 high school basketball games and 15 high school football games each season, as well as many Thomas More College football and basketball games, and local swimming, diving and cross country meets, as well as numerous community fairs, festivals and events.

The TBNK Government Channel, operating much like a local version of C-SPAN, provides gavel to gavel coverage of over 20 government meetings every month, including city councils, the Kenton County Fiscal Court, Transit Authority of Northern Kentucky and Kenton County Planning Commission meetings, contributing to open and transparent government and keeping citizens informed about the actions taken by local elected officials.

The TBNK helps provide important information from local governments, promotes community services and economic development, and produces numerous public affairs talk shows with officials from member cities and counties, programs with the county libraries, county parks and NKY solid waste management, Northern Kentucky Chamber of Commerce events, and our Discover Northern Kentucky history programs, as well as numerous informational programs about initiatives such as the Census, and Link-GIS

Our PEG Channels offer the kind of programming that may not be commercially profitable, but which is still important to our local communities. PEG channels provide a needed forum for area community organizations, schools, churches, citizens, and government agencies – and in our case virtually the only meaningful media coverage for Northern Kentucky. PEG Channels are one of the last surviving sources for local TV across the country. These channels are especially important to our Northern Kentucky communities (which are suburbs to Cincinnati, Ohio) due to the lack of any real broadcast coverage from the Cincinnati based broadcasters, who act like the Ohio River is an ocean, and seldom venture across to provide any coverage of our area – unless they are chasing ambulances or scandals.

We have created a clip reel in order to provide a partial overview of just some of the many and varied programs that are produced at the TBNK PEG Channels. Here is a link to the video. <https://www.youtube.com/watch?v=n9qxxv6KMj8g>. In order to try to keep the clip reel to a manageable size, the clips are only a small sample of the shows that air on our channels.

In the FNPRM, the FCC also states that it sees no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable related, in-kind contributions for purposes of the five percent franchise fee cap. The FCC also asserts that if cable-related, in-kind contributions are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee.

We disagree with these two points. First unlike non-cable related benefits, the cable related obligations cannot be unlimited, because the negotiation process outlined in the Telecom Act specifically provides for a process where a community's cable related needs and interests are determined and the cable operator offers a proposal to answer those needs. The Act's negotiation

process then also provides that those requirements for such cable related needs are to be balanced against reasonable cost. Therefore LFA's are NOT able to ask for unlimited cable related benefits. It should be obvious, that this franchise negotiation process, along with the fact that PEG channel capacity and facilities (including I-NETs) are specifically spelled out in the Act, clearly distinguishes them in the legislative history from non-cable related contributions.

In addition, unlike the examples set forth in the FCC's FNPRM wherein cable operators have sometimes provided 'in-kind' benefits to LFA's that were not cable related, and specifically were not PEG obligations as LFAs are specifically authorized in sections 611 and 621 and 624 of the Act; the PEG related obligations set forth in section 621 are specifically set forth in section 621, instead of in section 622, because such PEG obligations are NOT franchise fees, otherwise they would have been set forth as a type of franchise fee in section 622. Rather, such PEG obligations are GENERAL FRANCHISE REQUIREMENTS – as the title of section 621 makes clear. PEG obligations are clearly grouped here, along with issues related to build out (which the FCC has already agreed are a category that is not a franchise fee,) and with other core franchising matters, obligations and limitations, such as; establishing that a cable operator may not provide cable service without a franchise; ensuring that there shall be no adverse effects as to the safety, functioning and appearance of property and the convenience and safety of persons; assuring that access to cable service is not denied to any group of potential residential cable subscribers because of income level; allowing reasonable time for build outs; requiring adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service; and certain limitations on regulations of non-cable telecommunications services. All of these matters, which, along with PEG channel capacity and facilities, are outlined in this

section 621 GENERAL FRANCHISE REQUIREMENTS are also matters that are not deducted from franchise fees, and for which would make no sense to do so.

By this organizational construction of the Act, it should be clear that PEG obligations are a core general franchise requirement, the same as build out and the other matters described in Section 621 GENERAL FRANCHISE REQUIREMENTS, which are separate from Franchise Fees. Despite the tentative assertions of the FNPRM, claiming that cable related franchise obligations should be seen as the same as non-cable related benefits; this should make it clear that, under the language and construction of the Telecom Act, cable related franchise obligations (and even more so, PEG related obligations) are very different from non-cable related obligations. The Telecom Act even provides very specifically that, unlike non-cable related benefits, cable related obligations cannot be unlimited, because the negotiation process outlined in the Telecom Act specifically provides for a process where a community's cable related needs and interests are determined and the cable operator offers a proposal to answer those needs. However the Act also provides that those requirements for such cable related needs are to be balanced against reasonable cost. Therefore LFA's are NOT able to ask for unlimited cable related obligations.

From its inception, a lot of the promise of cable TV was that it could provide a much better variety of programs and alternatives to the big national networks - including local programming that would serve local communities. A big cause of the recent funding problems for local PEG television is due to heavily financed lobbying by the cable industry, which has been pleading how poor they are, when they continue to provide very healthy profits margins for their stock holders. It is not too much to expect that the for profit entities who use the communities' property to string their cables provide a few channels and production support for

local community programs in exchange for the ROW use that allows them to transmit hundreds of channels and operate very lucrative businesses.

So why has proper payment for use of the ROW space been so heavily attacked? Why are huge media conglomerates, which continue to consolidate cable companies across the country, and continue to raise cable rates every year, seen as some sort of struggling mom and pop shop that needs more and more concessions at every turn?

This change in interpretation of the Telecom Act proposed by the FNPRM is in direct contradiction to how Franchise Fees and PEG obligations and other core franchise requirements have been treated for decades, and specifically to the what our cable operators have agreed to in their franchise agreements in our communities, that any cost associated with the provision of Public, Educational and Governmental Access Facilities, shall not be deducted from the Franchise Fee, and shall not be considered or treated as a franchise fee, and that the PEG Channels shall be available for use as provided in the Franchise without charge or cost to the Authority, its designated agent, TBNK or the Subscriber. We urge the FCC to NOT adopt this FNPRM.

We appreciate the opportunity to add to the record in this proceeding.

Respectfully submitted,

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